

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL **74-1960**

United States Court of Appeals

For the Second Circuit

STAMICARBON, N.V.,

Plaintiff-Appellant,

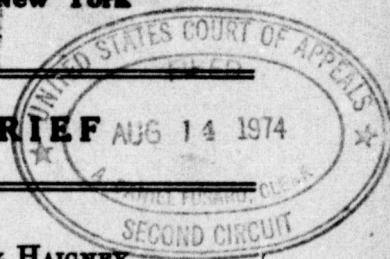
v.

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

**On Appeal from the United States District Court
for the Southern District of New York**

APPELLANT'S BRIEF



IDE & HAIGNEY

Attorneys for Plaintiff-Appellant

41 East 42nd Street

New York, New York 10017

MU 2-2590

JOHN E. HAIGNEY

RONALD M. GLICK

Of Counsel

1

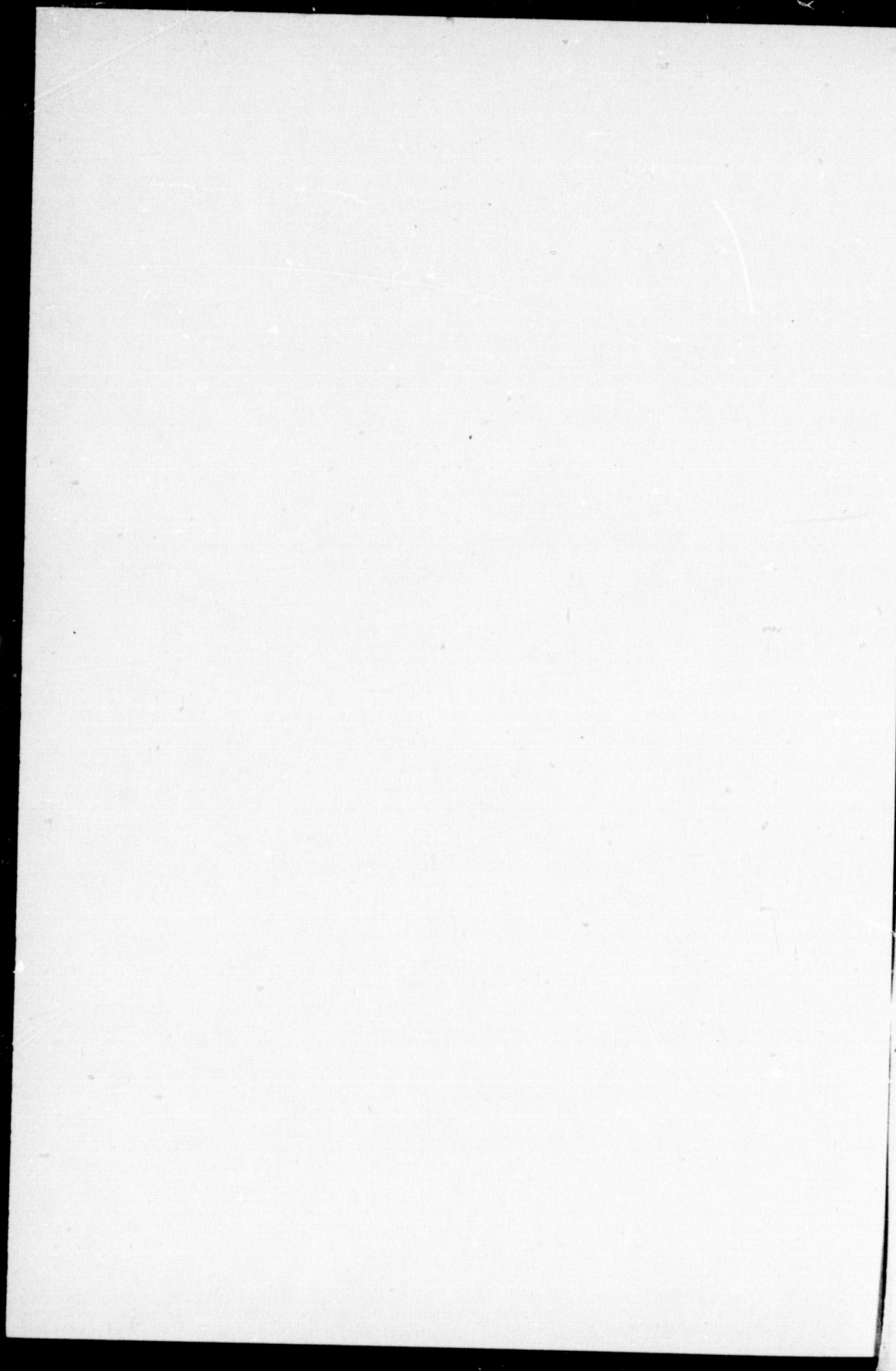


TABLE OF CONTENTS

	PAGE
Table of Authorities	III
The Issues Presented for Review	1
Statement of the Case	3
Nature of the Case	3
Course of Proceedings	3
Disposition in the Court Below	4
Statement of Facts	5
Point I—Cyanamid, as Stamicarbon's licensee of Stamicarbon's valuable trade secret, is under a contractual obligation to use its "reasonably best" efforts to "prevent" public disclosure of such trade secrets. Cyanamid is under an obliga- tion to give consent to the <i>in camera</i> receipt of any evidence relating to such trade secret in the criminal contempt proceedings in which Cyanamid is also a defendant since such act involves no substantial effort. The Court should have en- forced such obligation or, on familiar equity prin- ciples, deemed such consent to be given	15
(a) Cyanamid has the express contractual obli- gation to make positive efforts to prevent public disclosure of Stamicarbon's trade secrets	16
(b) Implicit in the license agreement of Stami- carbon's trade secrets is the obligation to refrain from compelling the public disclosure of such trade secrets by others who share such knowledge	17

(c) There can be no reasonable presumption that, in executing the license agreement obligating Cyanamid to safeguard Stamicarbon's trade secrets, the parties intended that Cyanamid reserve the freedom to exercise constitutional rights which, if exercised, would involve public disclosure of the secrets	19
Point II—Assuming that Cyanamid's license agreement includes an obligation to consent to the <i>in camera</i> protection requested by Stamicarbon, there is no overriding public policy which precludes the Court from enforcing such obligation	24
Point III—Even without Cyanamid's contractual obligation, the receipt <i>in camera</i> of any evidence relating to Stamicarbon's valuable trade secrets is a proper procedure that can be adopted in this Court's discretion in the interest of justice to resolve the conflict between Cyanamid's asserted constitutional right to a public trial and Stamicarbon's right to preserve its valuable trade secret from destruction	26
Point IV—The court below had already entered an order upon Cyanamid's consent in criminal contempt proceeding, in effect, providing for the <i>in camera</i> protection of Stamicarbon's trade secrets to the extent that information was disclosed in certain documents employed or received by Government's expert. Cyanamid's consent to such <i>in camera</i> protection <i>without knowing</i> the extent to which such trade secrets were so disclosed constitutes a waiver of its right to public trial with respect to any such information	34
Conclusion	36

TABLE OF AUTHORITIES

	PAGE
<i>Cases</i>	
E. I. DuPont De Nemours Powder Co. v. Masland, 244 U.S. 100	23
Estes v. Texas, 381 U.S. 532 (1965)	30
Forgay v. Conrad, 6 How. 201 (1846)	1
Geise v. United States, 265 F.2d 659 (9th Cir., 1958), cert. den. 361 U.S. 842	25
Harris v. Stephens, 361 F.2d 888 (6th Cir.), cert. den. 386 U.S. 964	29
Imperial Chemical Industries, Ltd. v. National Distillers and Chemical Corp., 342 F.2d 737 (2nd Cir., 1965)	23
Johnson v. Zerbst, 304 U.S. 458 (1938)	19
Kewanee Oil Co. v. Bicron Corp., — U.S. — (No. 73-187, 1974)	32
Lacaze v. United States, 391 F.2d 516 (5th Cir., 1968)	28
Lancaster v. United States, 293 F.2d 519 (D.C. Cir.)	25
Mixing Equipment Co., Inc. v. Philadelphia Gear, Inc., 436 F.2d 1308 (3rd Cir., 1971)	23
People v. Hinton, 31 N.Y.2d 71 (1972), cert. den. 410 U.S. 911 (1973)	29
Santobello v. New York, 404 U.S. 257 (1971)	25
Sheppard v. Maxwell, 384 U.S. 333	30
United Press Associates v. Valente, 308 N.Y. 79 (1954)	25
United States v. Bell, 464 F.2d 667 (2nd Cir., 1972), cert. den. 409 U.S. 991 (1972)	30

	PAGE
United States ex rel. Bennett v. Rundle, 419 F.2d 599 (3rd Cir., 1969)	29
United States ex rel. Bruno v. Herold, 408 F.2d 125 (2nd Cir., 1969), cert. den. 397 U.S. 957	30
United States v. Capello, 327 F.2d 378 (2nd Cir., 1964)	25
United States v. Clark, 475 F.2d 240 (2nd Cir., 1973)	31
United States v. Marchetti, 466 F.2d 1309 (4th Cir., 1972), cert. den. 409 U.S. 1063	21
United States ex rel. Orlando v. Fay, 350 F.2d 967 (2nd Cir., 1965), cert. den. 384 U.S. 1008	31
United States v. Sorrentino, 174 F.2d 721 (3rd Cir., 1949, cert. den. 338 U.S. 928	25

Statutes

5 U.S.C. Sec. 552(b)(4)	32
15 U.S.C. Sec. 78x(a)	33
15 U.S.C. Sec. 46(f)	33
15 U.S.C. Sec. 1263(h)	33
15 U.S.C. Sec. 1401(c)	33
18 U.S.C. Sec. 1905	32
21 U.S.C. Sec. 331(1)	33
33 U.S.C. Sec. 1160(f)(2)	33
42 U.S.C. Sec. 1857d(c)(5)	33
P.L. 93-12 of March 30, 1973	27

Other Authorities

Callman, The Law of Unfair Competition, Trade- marks and Monopolies (3rd ed. 1973), Vol. 2, §59.1	23
Clark, Principles of Equity (1924 ed.) §20	23
Proposed Federal Rules of Evidence, Approved by the United States Supreme Court Nov. 20, 1972, Rule 508	28
Rule 1101(b)	27
Milgrim, Trade Secrets (1967) Sec. 708	23

United States Court of Appeals

For the Second Circuit

STAMICARBON, N.V.,

Plaintiff-Appellant,

v.

AMERICAN CYANAMID COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANT'S BRIEF

The Issues Presented for Review

This is an appeal from a decision and order of a District Court denying a plaintiff's motion under FRCP Rule 65 for a preliminary injunction (44a-45a) in a case where plaintiff's action is one for permanent injunctive relief of like scope (5a). In the nature of the case, in which plaintiff sought preliminary injunctive relief to prevent imminently threatened destruction of its trade secrets by public disclosure at a public trial of a pending criminal proceeding to which it is not a party (4a), and in which the District Court's denial of the motion was based entirely upon a view that it lacked power to grant the relief requested (44a), the denial of the motion is an effective final determination of the action under *Forgay v. Conrad*,

6 How. 201, (1846). The question for review, therefore, is whether the District Court committed reversible error in so holding. This question involves the following issues.

1. Does a provision in a license agreement relating to valuable trade secrets in which licensee acknowledged that the secrets were "strictly confidential" and in which the licensee expressly promised to use its "reasonably best" efforts to "prevent" public disclosure thereof, require the effort involved in the licensee's giving consent that any evidence at the trial of a criminal contempt proceeding in which it is the sole accused, which would disclose such trade secrets, be received *in camera*?

2. If so, is there some overriding public policy preventing the courts from enforcing the licensee's contractual obligation to make such effort?

3. If not, did the court below nevertheless have inherent power to protect the destruction of a non-party's valuable trade secrets that would occur from a wholly public trial of a criminal contempt proceeding involving probable disclosure of such trade secrets, by conducting that part of the trial *in camera*?

4. Had the court below, prior to plaintiff's motion, already received a waiver from the accused authorizing the *in camera* receipt of all information relating to the plaintiff's trade secrets by stipulating to order of secrecy already made by the court in the criminal proceeding?

Statement of the Case

Nature of the Case

This is a civil action in the United States District Court, Southern District of New York, 74 Civ. 2990 (Brieant, J.) (2a) of which the District Court found it has jurisdiction (42a) and does have jurisdiction under 28 U.S.C. Sec. 1332.

The action has a very limited purpose. The action is one by a Netherlands chemical corporation plaintiff, Stamicarbon, N.V., ("Stamicarbon") against a Maine chemical corporation defendant, American Cyanamid Company, ("Cyanamid"), for permanent injunction enjoining Cyanamid from refusing to consent that such part *and only that part* of the trial of criminal contempt charges by the United States of America (the "United States") against Cyanamid in another civil action in the District Court, 60 Civ. 3857, as would involve disclosure of Stamicarbon's trade secrets involving a process for manufacturing melamine from urea and ammonia and related technical knowledge for utilizing that process, which are licensed by Stamicarbon to Cyanamid and competitor producers of melamine therewith, be conducted *in camera*, with the general public excluded from that part of that trial, so that those trade secrets, which have a value in excess of \$1,000,000, are not publicly disclosed and thereby destroyed (2a-7a).

Course of Proceedings

This action was commenced on July 12, 1974 (1a) only after it became imperative to do so. On the preceding day, at a conference held in the District Court in 60 Civ. 3857 before Judge Brieant thereof preliminary to the trial of

the criminal contempt proceedings, counsel in that action indicated it was likely that evidence would be elicited at that trial respecting Stamicarbon's trade secrets (9a). Counsel for the United States therein consented that such portions of the trial be held *in camera*, but the defendant-accused therein, Cyanamid, refused to consent (4a, 9a). Since the trial of the criminal contempt proceedings in 60 Civ. 3857 was scheduled to commence at 10 a.m. July 15, 1974 (11a), Stamicarbon obtained an order to show cause, issued by Judge Briant, to whom this action is also assigned (2a), returnable at 9 a.m. July 15, 1974, why a preliminary injunction under FRCP Rule 65 should not be made in this action (11-12a).

A hearing on plaintiff's motion for a preliminary injunction was held by Judge Briant in the District Court on July 15, 1974 (13a-46a). At the hearing, Cyanamid did not dispute any of the facts alleged in the plaintiff's verified complaint herein or the affidavit in support of its motion (39a-41a). Its opposition to the motion was limited to a legal memorandum opposing it and contention that the motion should be denied and the complaint dismissed for failure to state a claim (40a-41a).

Disposition in the Court Below

The District Court found that it had jurisdiction of the action and the parties (42a), that the complaint submitted a litigable question for preliminary relief (45a), that Stamicarbon owns secret processes licensed to Cyanamid and to several of its competitors, all of whom have agreed to keep that knowledge inviolate as a trade secret (42a), that it was not inconceivable that a question would be asked at the trial of the criminal contempt proceedings which called

for a responsive answer disclosing such secret information, and that the Court could not rule that elements of the secret process would not be relevant at that trial (43a), and that Stamicarbon would be irreparably damaged if its trade secrets were disclosed (42a). It denied the motion solely because it considered itself without power to do so in the face of Cyanamid's unwillingness to waive its right to a public trial in the criminal contempt proceedings (44a-45a).

The District Court nonetheless delayed the commencement of the trial in 60 Civ. 3857 for two days to permit Stamicarbon to appeal to this Court and seek a stay pending that appeal (45a). Stamicarbon filed its notice of appeal (47a) on July 17, 1974 (1a). This Court, on that day, entered an order staying the trial in 60 Civ. 3857 pending determination of this appeal.

Statement of Facts

Stamicarbon is engaged in the business of exploiting secret know-how on apparatus and processes relating to the manufacture of melamine (3a). Melamine is a chemical compound used chiefly in the manufacture of melamine resins (5s),¹ which are used to make adhesives and coatings used in the manufacture of laminated and other plastic products.² Such know-how has been acquired over a substantial period of time and at substantial cost. Such know-how has been offered for license and licensed to licensees in various parts of the world under license agree-

1. Also Random House Dictionary of the English language (1967 unabridged ed.) p. 892.

2. Ibid, p. 892.

ments that require the licensees to safeguard and maintain the secrecy of such know-how (3a, 42a).

To date, Stamicarbon has maintained the secrecy of such know-how as its trade secrets and enjoys substantial revenues derived therefrom (3a). It also contemplates executing other licenses with prospective licensees but can only do so so long as such know-how has not become public knowledge (4-5a).

The record shows that Stamicarbon has made three such license agreements with chemical companies in the United States, who constructed plants utilizing the Stamicarbon trade secrets (31a). The first was a company referred to in the record as "Premier" (17a, 31a).³ The second was a company referred to in the record as "MCI" (23a, 31a).⁴ The third was American Cyanamid (31a). Each of the license agreements made by Stamicarbon requires the licensee to safeguard and maintain the Stamicarbon licensed information in secrecy and not to divulge such know-how to the public (3a, 41a, 36a) and to keep that knowledge inviolate as a trade secret (42a).

In accordance with the Article III of the license agreement, attached to the Complaint, Cyanamid is under the contractual obligation to Stamicarbon to "safeguard the secrecy of such know-how" and to use its "reasonably best" efforts to "prevent disclosure thereof to third parties." The secrecy agreement provides in part:

"Client [Cyanamid] shall treat all Stamicarbon Know-How furnished to Client under this agreement

3. Premier Petro Chemical Company (41s).

4. Melamine Chemicals, Inc. (36s).

as strictly confidential and shall use its reasonably best efforts to prevent the disclosure thereof to third parties. Client agrees to preserve and safeguard the secrecy of such Know-How with the same degree of care which Client exercises with respect to its holding its own proprietary information in confidence" (6a).

A criminal contempt proceeding is about to be tried in the District Court which involves probable disclosure of Stamicarbon's "Know-How." The only parties to such criminal contempt proceedings are the United States Government and Cyanamid (20a, 27a). The criminal contempt proceeding is an outgrowth of an antitrust judgment entered in 1964 against Cyanamid (21-24a).

In August 1964, when the judgment was entered, dicyanamide was the basic raw material from which melamine was and had therefore been commercially produced (5s). Subsequently, however, Stamicarbon, at substantial cost (3a), developed a process and knowledge relating to apparatus used therewith for the manufacture of melamine from urea and ammonia (3a). It is that process and knowledge that constitutes the "Know-How" licensed by Cyanamid that are the trade secrets that are the subject of this controversy in this civil action (42a).

The Court in its opinion described the nature of the criminal proceedings, as follows:

"* * * the defendant American Cyanamid Company purportedly entered into a consent decree in 1964 in this court and has been charged by an order to show cause issued by this Court with having violated essential terms of that decree in 1972 and it is alleged in the underlying proceeding bearing docket No. 60 Civ. 3857 that defendant American Cyanamid admitted com-

mitting a criminal contempt against this Court's—in disobedience to this Court's lawful decree by manufacturing more Melamine than it was permitted to do under the decree, at a time when the industrial capacity of nonconspiratorial producers of Melamine did not reach the quantum set forth in decree.

The defendant American Cyanamid has denied any criminal liability and has pleaded not guilty.

The Government, in presenting the order to show cause why American should not be adjudged guilty of the criminal contempt pursuant to Rule 42-B indicated to the Court that it was demanding a fine or penalty in excess of \$500.” (41a)

* * *

“At issue in this trial will be the amount of capacity in the industry in 1973. The plaintiff in this action, Stamicarbon is the owner of certain secret processes which were licensed to American Cyanamid and several of its competitors. Each person with knowledge has agreed to keep that knowledge inviolate as a trade secret or secret process”. (42a)

In the pre-trial proceedings in such criminal contempt action, a representative of Stamicarbon requested that the court conduct such trial in a manner by which any information relating to its trade secrets would not be disclosed to the public. Counsel for the United States Government indicated that he would consent to the conduct of the trial in such manner, but counsel for Cyanamid refused. The court announced that it was reluctant to order that the trial be conducted in such manner unless Cyanamid consented (4a, 9a).

On the following day, Stamicarbon filed this action based upon Cyanamid's failure to carry out its obligations to use

its "reasonably best" efforts "to prevent" disclosure of such trade secrets to third parties, asserting that the giving of consent to such a partially *in camera* trial was within the "efforts" contemplated under the license agreement "to prevent" public disclosure. On the same day, upon plaintiff's application, Judge Bricant issued an order to show cause, returnable before him on Monday, July 15, 1974, as to why Cyanamid should not be enjoined from continuing to refuse to give such consent (11-12a).

As the record shows, plaintiff's application for temporary injunction was heard by the court partially *in camera* (21a, 39a).

The court and the parties endeavored to reach some compromise procedure that would protect the plaintiff's secret know-how without conducting the trial partially *in camera*. The court indicated that plaintiff's counsel, assisted by engineers, would be allowed to attend the criminal contempt proceedings and to indicate to the court whenever evidence was being elicited or offered relating to Stamicarbon's trade secrets (42a). However, the court made clear that, if, after being alerted to the fact that the trade secret information was involved in the proposed evidence, if the court found that evidence relevant, it would admit that evidence in open court (44-45a).

Court and counsel had also explored the possibility that the plaintiff's order to show cause be held in suspense, and that, during the criminal contempt trial, the plaintiff be allowed to press its motion at any time when it appeared that its trade secret information was relevant. The court was unwilling to adopt this procedure since it considered

that jeopardy would have attached by beginning the trial in the criminal proceeding and that such interruption might create a claim of double-jeopardy (34-35a).

The criminal contempt trial necessarily involves evidence with respect to Stamicarbon's trade secrets as practiced at the plants of Premier and MCI, its licensees. This is so because the central issue in the criminal contempt proceeding is what was the production capacity for melamine of Cyanamid's competitors in the United States (22-24s) at the time in 1972 when Cyanamid produced more than 30-million lbs. of melamine (29s). As the Court stated, the issue in that proceeding was whether Cyanamid had disobeyed the Court's decree "by manufacturing more melamine than it was permitted to do under the decree, at a time when the industrial capacity of non-conspiratorial producers of melamine did not reach the quantum set forth in [the] decree" (41a).

Since issue of capacity necessarily involves evidence of the nature and operation of such plants, such evidence necessarily involves disclosure of Stamicarbon's trade secrets upon which such plants are based and operated (22-25a, 36-37s, 41-42s).

During the course of the hearing it also became clear that the principal threat of public disclosure and destruction of Stamicarbon's trade secrets *was the evidence that Cyanamid intended to elicit.*

Government's counsel described the effort it would make to avoid disclosing Stamicarbon's trade secrets. He stated:

"... we cannot guarantee at this point that a question I ask which I feel is very relevant to my case would

not elicit some information which would be secret. I have purposely structured my questions to avoid that but I cannot guarantee it and I don't think Mr. Murphy [Cyanamid's counsel] can guarantee it." (19a, bracketed material added.)

He also produced a document prepared by MCI, which he acknowledged contained "proprietary information" (22a) and which he characterized as listing "all the operating problems the plant had," and saying that "I would believe that Mr. Murphy would wish to get into the causes and results of those problems in determining whether or not the capacity of the plant was 70 million pounds or less as the government maintains" (22a).

Mr. Murphy, in effect, concurred. He stated:

"Well, let me give your Honor an example which I think is in that exhibit. I am not positive but I know that one problem MCI has which I assume its witnesses will testify to was lumps in the reactor. I don't know what that means but I do understand it is a problem. If they testify, MCI for example, that their plant could not perform to its contractual capacity because of lumps in the reactor, it will then be necessary for me to inquire and cross-examination into the cause of the lumps, namely were they, on the one hand, caused by something inherent in the process, which may be MCI's contention, I do not know. . . . On the other hand, were they caused by improper maintenance and improper adjustments of [type of equipment deleted] and if you don't take good care of them and keep out the scale and dirt and so forth instead of the [type or desired occurrence deleted] there is a [type of undesired occurrence deleted] and the [type of undesired occurrence deleted] makes a lump, that *that is a secret Mr. Haigney would have to object at that time.*

"If the witness has been allowed to testify on direct that he had a problem with the lumps in his reactor, then I would feel I would be entitled on cross to inquire as to why." (29-30a, emphasis added)

The need for inquiring at the trial of the criminal contempt proceedings into the causes for the failure of Cyanamid's competitors to have produced in 1972 as much melamine as the design capacities of their plants is apparent. Cyanamid cannot be in criminal contempt of the antitrust judgment if its competitors failed to properly utilize the production capacity they actually had. The issue of capacity in the criminal contempt proceeding therefore turns upon whether or not these plants, which utilize the same Stamicarbon trade secrets licensed to Cyanamid, were properly operated by its competitors and actually had the capacity they were designed to have.

Cyanamid's counsel did not deny the allegations contained in the complaint or the moving affidavit but did deny that the complaint stated a cause of action and that the court had jurisdiction (39-40a).

The court denied plaintiff's motion for a preliminary injunction (45a) *solely* on the ground that it deemed itself without power to deprive the defendant of a public trial (44a) "even if it is conceivable that the process secrets might become relevant" (44a). The court expressly found that "plaintiff Stamicarbon would be irreparably damaged if the secrets were disclosed" (43a). Further, that "it is possible, it is not inconceivable that there might be a question which would arise in cross-examination of the expert or in some other fashion which might call for a responsive

answer which could disclose a secret process" (43a). Further, "the plaintiff here, Stamicarbon, is in no position to protect its secrets in the event the court rules erroneously" (43a). It concluded that:

"Defendant has its right to a public trial and the court has to balance the right to a public trial on the one hand with the right to have secrets preserved on the other, and believes that the court lacks power under the circumstances of this case, and at this stage of the proceedings or indeed at any time, to compel the defendant American Cyanamid Company against its wishes to submit to having all or part of the trial *in camera*" (44a).

The court made no reference to the license agreement obligating Cyanamid to use its reasonably best efforts to prevent their disclosure to third parties except to state that, "Each person with knowledge has agreed to keep that knowledge inviolate as a trade secret or secret process," (42a).

Subsequent to the taking of this appeal, plaintiff's counsel became aware of the existence of a stipulation *signed by Cyanamid* in the criminal contempt proceedings consenting to an order of secrecy with respect to Stamicarbon's trade secrets. Such stipulation was made on May 7, 1974 and such order on May 8, 1974. As indicated in Point IV of this brief, it is believed that such consent by Cyanamid to such order of secrecy constitutes a waiver of any constitutional right Cyanamid might have had to preventing the trial court from providing *in camera* protection of such trade secrets.

The May 8, 1974 court order and stipulation related to a report of Mr. J. Lisle Reed which was entitled, "U.S.

Plant Capacity for the Production of Melamine, An Independent Study Conducted for the Department of Justice and American Cyanamid, Inc., dated March 7, 1973" and to documents "employed or received" by Mr. Reed in conducting the study which preceded that report. The order designated the documents as containing "sensitive commercial or proprietary information." (32a).

The record indicates that such information included Stamicarbon's trade secrets obtained from Stamicarbon's other licensees. At the hearing, the court directed the following question to the Government's counsel:

"The Court: The Government has received your [Stamicarbon's] secrets indirectly and has agreed to preserve the secrecy. Isn't that true, Mr. Sonnett?"

"Mr. Sonnett: It has been transmitted, your Honor, the information has been transmitted to J. Lisle Reed, who we will call as witness under a pledge of confidentiality." (32a, explanatory material in brackets added.)

The May 8, 1974 order provides, in substance, for the *in camera* protection of any information contained in such report or documents during the trial of the case by stating:

"If said report, documents or information contained therein are used in conjunction with the trial of this case, they shall be utilized in a manner which will maintain the confidentiality of the sensitive commercial or proprietary information contained therein, subject to further order by the court." (32-33s, emphasis added.)

While the record shows that the "sensitive commercial or proprietary information" referred to in the order in-

cluded information relating to Stamicarbon's trade secrets, there is no evidence in the record of the extent to which such secrets were incorporated in the documents referred to therein.

However, it is believed that Cyanamid's consent to such order, in view of the order's lack of limit as to the Stamicarbon secret information that might have been incorporated in such documents and thus protected by *in camera* treatment, should be deemed a waiver of objection to the *in camera* receipt of any Stamicarbon trade secrets.

POINT I

Cyanamid, as Stamicarbon's licensee of Stamicarbon's valuable trade secret, is under a contractual obligation to use its "reasonably best" efforts to "prevent" public disclosure of such trade secret; Cyanamid is under an obligation to give consent to the *in camera* receipt of any evidence relating to such trade secret in the criminal contempt proceedings in which Cyanamid is also a defendant since such act involves no substantial effort; the Court should have enforced such obligation or, on familiar equity principles, deemed such consent to be given.

Cyanamid has refused to consent not only to the *in camera* receipt of evidence offered by the Government with respect to Stamicarbon's trade secret information but also with respect to such information that Cyanamid itself intends to elicit or offer at the criminal contempt trial,—even though the result of such disclosure, without such protection, will result in the destruction of Stamicarbon's trade secrets (43a). The appellant's contention here is that this

refusal to give consent, which is clearly within Cyanamid's power to give, violates its express and implied contractual obligations under its license agreement with Stamicarbon.

(a) Cyanamid has the express contractual obligation to make positive efforts to prevent public disclosure of Stamicarbon's trade secrets.

Cyanamid is under an express obligation to Stamicarbon not only to treat all Stamicarbon Know-How with which it was furnished "as strictly confidential". It is also expressly obligated under Article III of the Agreement to use its "reasonably best" efforts to "prevent" disclosure thereof to others (6a).

The degree of effort called for by the contract is "reasonably best." The effort involved, which the motion requested, is minimal. It involves no more than an expression of assent.

The court below's decision did not expressly discuss the scope of Cyanamid's contractual obligation under its license agreement with the plaintiff or indeed make any mention of the agreement upon which the plaintiff's complaint was based except to state:

"The plaintiff in this action, Stamicarbon, is the owner of certain secret processes which were licensed to American Cyanamid and several of its competitors. Each person with knowledge has agreed to keep that knowledge inviolate as a trade secret or secret process." (42a).

It is unclear whether the court below believed that the secrecy agreement did involve an obligation to give the

consent sought to be compelled by the motion but which the court considered itself powerless to enforce, or whether it believed that the secrecy agreement did not encompass such an obligation and, in its absence, the court was without power to grant the relief sought.

If the court below did conclude that Cyanamid's obligation did not encompass the minimal effort involved in giving the consent necessary to "safeguard" Stamicarbon's trade secrets and to "prevent disclosure" (6a), it is submitted that the court was in clear error in so misconstruing the agreement.

Normal rules of contract construction apply to the agreement. The agreement plainly calls for affirmative efforts by Cyanamid to preserve secrecy. It expressly delineates only three exceptions to Cyanamid's obligation (6a), none of which is applicable here. The intent of the promise made clearly was that Cyanamid would do what reasonably was within its power to do to prevent public disclosure of trade secret information involved.

(b) Implicit in the license agreement of Stamicarbon's trade secrets is the obligation to refrain from compelling the public disclosure of such trade secrets by others who share such knowledge.

In the court below Cyanamid argued that since its contractual obligation was limited to the Stamicarbon Know-How "furnished to Client," *i.e.*, to Cyanamid, it therefore has no obligation to make affirmative efforts to prevent public disclosure emanating *from others*, such as other licensees, or from Mr. Reed. But such argument has no validity *when Cyanamid itself causes such disclosure in*

defending itself in litigation when it is completely capable of doing so in a way that prevents such disclosure *from being public*.

As shown in the statement of facts, pp. 11-12 herein, the principal threat of public disclosure and destruction of Stamicarbon's trade secrets is from Cyanamid itself. Government counsel, at the hearing below, indicated that he would attempt to structure his direct examination questions so as to present the Government's case in the criminal contempt proceedings without involving disclosure of Stamicarbon's trade secrets (19a). Moreover, the Government consented that any evidence of trade secrets be taken *in camera* (4a). But, counsel for the Government and for Cyanamid both acknowledged that, in cross-examining Government witnesses, Cyanamid's counsel might compel disclosure of such trade secrets (19a, 22a, 29-30a), and Cyanamid refused to consent that such evidence be taken *in camera*.¹

Plaintiff here does not suggest that Cyanamid's defense of the criminal contempt charges against it in 60 Civ. 3857 be limited in any way. The *in camera* protection for Stamicarbon trade secret information sought does not impose

1. Cyanamid's intent to elicit or offer trade secret evidence at the criminal contempt proceeding is also indicated by the fact that it served a subpoena duces tecum therein upon Stamicarbon's licensee, Melamine Chemicals, Inc. ("MCI") (36s, 38s) to produce "materials relating to the design construction and capacity . . . of the melamine plant operated by" MCI (38s). Cyanamid's counsel acknowledged that its subpoena covered "trade secrets" (39s). MCI moved to quash the subpoena because of its own contractual obligation not to disclose "confidential information of Stamicarbon" (36s). The District Court declined to quash the subpoena (40s), although it did limit access of the subpoenaed materials to "a limited number of persons in Cyanamid" (40s).

any such limitation. Cyanamid's posture is that it intends to use the same Stamicarbon trade secret information which it shares with other Stamicarbon licensees in its own defense of those charges. Although it could do so without destroying the trade secrets by public disclosure, by consenting to *in camera* receipt of such evidence, as was consented to by the Government, it will not use such means.

- (c) There can be no reasonable presumption that, in executing the license agreement obligating Cyanamid to safeguard Stamicarbon's trade secrets, the parties intended that Cyanamid reserve the freedom to exercise constitutional rights which, if exercised would involve public disclosure of the secret.**

In its memorandum opposing the motion in the court below, Cyanamid asserted its right under the Sixth Amendment to a "public trial" of the charges against it in 60 Civ. 3857, and argued that its agreement with Stamicarbon should not be regarded as limiting that right, relying upon the general statement by the Supreme Court in the case of *Johnson v. Zerbst*, 304 U.S. 458 (1938), to the effect that courts should indulge "every reasonable presumption against waiver of constitutional rights." This is an acceptable generality, but it is not equivalent to stating that an obligation assumed, which is inconsistent with the exercise of a constitutional right, will not be enforced unless such constitutional right has been specifically identified and explicitly disavowed. The law is not that unrealistic! And, of course, there is a vast difference between presumptions to be indulged in to ascertaining whether an uneducated person, charged in a criminal proceeding, should be deemed, by standing mute, to have waived the right to counsel, and

in interpreting the scope of an obligation to safeguard a valuable commercial secrets assumed in a written contract by a sophisticated corporate licensee desiring to acquire the right to use such secrets.

It is clear that there is no rule of law that requires that an agreement, to limit a constitutional right, must be specific. Like any other term of a commercial contract, the judicial function is to determine and give effect to the reasonable intent of the parties.

Could it seriously be argued that an arbitration agreement in a commercial contract was not enforceable because the contract did not explicitly state that, in making such agreement, the parties were waiving their constitutional rights under the Seventh Amendment to trial by jury of disputes which might arise?

Constitutional rights of free speech with respect to the secret information, and of a public trial involving such secret information, are both clearly opposed to an obligation to safeguard such secret from public disclosure.

It would be nonsense to assume that the licensor and licensee intended that the licensee's obligation to safeguard a trade secret was subject to the exception that he could, at his pleasure, utilize constitutional privileges to make disclosure through the public press or to force others, who shared the secret, to disclose the secret publicly in any judicial proceedings in which he was a party.

It cannot be said to be outside the contemplation of Cyanamid that, in the operation of its plant constructed to

practice the Stamicarbon trade secrets that were the subject of the license (6a), litigation might ensue that could have involved claims of negligence, violation of state or federal laws, or controversies with customers and competitors, any of which might have involved aspects of the trade secrets. If there is any presumption to be indulged, it is that the licensee would be expected to use whatever power was available to him to obtain the court's permission to the conduct of the proceedings in a fashion that would protect the secrets it had agreed to safeguard.

We know of only one example of anyone asserting a constitutional privilege to make public disclosure of secrets he had promised to safeguard. In the case of *United States v. Marchetti*, 466 F. 2d 1309 (4th Cir. 1972), cert. den. 409 U.S. 1063, the Court described the issue presented and ruled as follows:

"The question for decision is the enforceability of a secrecy agreement exacted by the government, in its capacity as employer, from an employee of the Central Intelligence Agency. Marchetti contends that his First Amendment rights foreclose any prior restraint upon him in carrying out his purpose to write and publish what he pleases about the Agency and its operations. Relying on a secrecy agreement signed by Marchetti when he became an employee of the Agency and on a secrecy oath signed by Marchetti when he resigned from the Agency, the District Court ordered Marchetti * * * not to release any writing relating to the Agency or to intelligence without prior authorization from the Director of Central Intelligence or from his designated representative. * * *

"We affirm the substance of the decision below, limiting the order, however to the language of the secrecy

agreement Marchetti signed when he joined the Agency. We find the contract constitutional and otherwise reasonable and lawful," 466 F.2d at 1311.

The Court, in upholding an injunction enforcing the secrecy agreement and enjoining public disclosure stated:

"We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed, *but we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to respect it.*" 466 F.2d at 1313 (emphasis supplied).

Thus, it held, the constitutional right of free speech attaches only to non-secret information. The Court explained that:

"As we have said, however, Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. *The agreement is enforceable only because it is not a violation of those rights,*" 466 F.2d at 1316 (emphasis supplied).

This decision clearly stands for the proposition that, if a party enters into an agreement to safeguard and not to disclose important secret information received in confidence from another party, his First Amendment constitutional right of free speech does not attach to such information, and he may not thereafter rightfully claim that he has retained a constitutional right to disclose it.

In summary, there appears to be no reason why the secrecy obligations expressly undertaken by Cyanamid to use its reasonably best efforts to prevent public disclosure, as part of the bargain of obtaining the plaintiff's valuable trade secrets, should not be interpreted in accordance with its plain meaning to include the minuscule effort involved in giving its consent that evidence thereof be received *in camera*, even though it be hypothesized that Cyanamid genuinely believes that such consent may somehow be to its disadvantage in the pending criminal contempt proceeding. The obligation to use reasonably best efforts to prevent public disclosure was not limited to instances in which it was in the best interest of Cyanamid to do so. The obligation was for Stamicarbon's benefit, not Cyanamid's.

That equity will protect against the unwarranted disclosure of a trade secret is settled "beyond peradventure." Milgrim, *Trade Secrets* (1967) §7.08[1], 2 Callman, *The Law of Unfair Competition, Trade marks and Monopolies* §59.1 (3rd ed. 1973); *E. I. DuPont De Nemours Powder Company v. Masland*, 244 U.S. 100; *Imperial Chemical Industries, Ltd. v. National Distillers and Chemical Corp.* (2nd Cir. 1965) 342 F.2d 737, 741; *Mixing Equipment Co. Inc. v. Philadelphia Gear, Inc.* (3rd Cir. 1971), 436 F.2d 1308,

It is also submitted that neither the Court nor the parties need await a formal consent from Cyanamid to the *in camera* protection requested. The court is sitting as a court of equity with full ability to exercise its ancient power to regard "that as done which ought to be done." Clark, *Principles in Equity*, §20 (1924).

POINT II

Assuming that Cyanamid's license agreement included an obligation to consent to the *in camera* protection requested by Stamicarbon, there is no overriding public policy which precludes the Court from enforcing such obligation.

It shall be assumed in this point that Cyanamid's obligation under its license agreement with Stamicarbon to use its reasonably best efforts to prevent disclosure of Stamicarbon's trade secrets to third parties encompasses the obligation to make the small effort involved in giving consent to the *in camera* protection requested by Stamicarbon.

It will be noted that the court below did not deny the *in camera* protection requested by Stamicarbon on the basis that consent by Cyanamid would have been ineffectual, but on the ground that such consent was necessary but unavailable. The district court concluded:

"Notwithstanding all these factual findings I conclude as a matter of law that under the circumstances of this case charged as it is with the crime of criminal contempt * * * defendant has its right to a public trial and the Court has to balance the right to a public trial on the one hand with the right to have the secrets preserved on the other and believes that the Court lacks power under the circumstances of this case, and at this stage of the proceedings or indeed at any time to compel the defendant American Cyanamid Company against its wishes to submit to having all or part of the trial *in camera*." (44a).

There would appear to be no dispute that, if Cyanamid is obligated to give consent to the *in camera* protection

sought by Stamicarbon, or is to be deemed, upon equitable principles, to have given such consent, that the consent would have been effective.

It appears clearly established that the public's interest in being present at a trial, while real, is not a legal right, *Geise v. United States*, 265 F.2d 659 (9th Cir., 1958), cert. den. 361 U.S. 842; *United States Press Association v. Valente*, 308 N. Y. 71 (1954). Moreover, whatever may be the public's interest in attending criminal trials generally, the public has no more legitimate interest in freely learning Stamicarbon's trade secrets than the public had in seeing a free showing of the allegedly obscene motion picture which the defendant was charged with having possessed with intent to distribute in *Lancaster v. United States*, 293 F.2d 519, in which the Circuit Court of Appeals (D.C.) held that it was proper for the trial court to have excluded the public during the showing thereof.

The right to a "public" trial is expressly given by the 6th Constitutional Amendment to the accused. It is clearly waivable by him. *United States v. Cappello*, 327 F.2d 378 (2nd Cir., 1964), *United States v. Sorrentino*, 174 F.2d 721 (3rd Cir., 1949), cert. den. 338 U.S. 928.

Indeed, were this not so, plea-bargaining in criminal cases would hardly be permissible. Yet, properly administered, it has been expressly approved by the Supreme Court to the point of requiring that such agreements be performed, *Santobello v. New York*, 404 U.S. 257 (1971). Justice Douglas' concurring opinion therein expressly notes that the practice is one in which 6th Amendment

rights are bargained away by the accused for lesser charges or an agreement of the prosecution respecting sentence recommendations, 404 U.S. at 264.

POINT III

Even without Cyanamid's contractual obligation, the receipt *in camera* of any evidence relating to Stamicarbon's valuable trade secrets is a proper procedure that can be adopted in the Court's discretion in the interest of justice to resolve the conflict between Cyanamid's asserted constitutional right to a public trial and Stamicarbon's right to preserve its valuable trade secret from destruction.

We shall assume here that Cyanamid's contractual obligation to use reasonably best efforts to prevent disclosure of Stamicarbon's valuable trade secrets does *not* oblige it to expend the small effort involved in giving consent to the protection sought by Stamicarbon. Nevertheless, did the court below have the power to adopt such procedure based on its inherent power and in the interest of justice because Cyanamid's right, as an accused, to a "public trial" does not extend to requiring a public trial of trade secret information? The court below eloquently stated its dilemma:

"* * * the court has to balance the right to a public trial on the one hand with the right to have the secrets preserved on the other and believes that the court lacks power under the circumstances of this case, and at this stage of the proceedings or indeed at any time, to compel the defendant, American Cyanamid Company, against its wishes to submit to having all or part of the trial *in camera*." (44a)

On the one hand, Cyanamid has the right to a public trial in the criminal contempt proceedings 60 Civ. 3857 to the extent such right is provided by the Sixth Amendment to the United States Constitution. On the other hand, Stamicarbon is the owner of a valuable trade secret that may be irreparably and irrevocably destroyed in the course of such proceedings unless protection from public disclosure is given.

Appellant concedes that this issue is one of first judicial impression. There are no authorities which have ruled upon the question of whether exclusion of the public from such part of a criminal trial at which trade secret information is presented would or would not be an impairment of the accused's Sixth Amendment right to "public trial."

However there has also been clear recognition by the Supreme Court of the United States that trade secrets are to be protected from disclosure in criminal trials in federal courts. The Proposed Federal Rules of Evidence, approved by the Judicial Conference in 1971, and approved by the Supreme Court in 1972, and which have been transmitted by the Supreme Court to the Congress for Congressional approval, after which they will become law, P.L. 93-12 of March 30, 1973, provide for the rules of evidence in criminal proceedings, as well as civil actions. Rule 1101(b) thereof expressly states:

"(b) *Proceedings Generally.* These rules apply generally to civil actions, including admiralty and maritime cases, to criminal proceedings, to contempt proceedings except those in which the judge may act summarily, and to proceedings and cases under the Bankruptcy Act."

Rule 508 of the Proposed Federal Rules of Evidence, which, as noted above, have been approved by the Supreme Court of the United States, is expressly entitled "Trade Secrets." It provides:

"A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose *and to prevent other persons from disclosing a trade secret owned by him*, if the allowance of the privilege not tend to conceal fraud is otherwise injustice. *When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.*" (emphasis added).

This proposed rule plainly indicates that the owner of trade secret entitled to such protection need not be a party to the case. The Advisory Committee Note to proposed Rule 508 says, significantly:

"The cases furnish examples of the bringing of judicial ingenuity to bear upon the problem of evolving protective measures which achieve a degree of control over disclosure. Perhaps the most common is simply to take the testimony *in camera*."

The *in camera* protection of trade secrets in criminal trials, thus approved by this nation's highest judicial authority, reflects the expressions of other courts which have held that the Sixth Amendment right to a "public trial" is not absolute, and that, where there is some strong legitimate competing interest in secrecy present, the competing interest is to be recognized, and that the public may be excluded from part of the proceedings to the limited extent necessary to accommodate that interest. As the 5th Circuit has said, "the constitutional right to a public trial is not a limitless imperative," *Lacaz v. United States*, 391 F.2d 516 (1968).

Thus, in *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (1969), although the 3rd Circuit there held that the exclusion from the courtroom of persons other than parties and witnesses at the suppression hearing was a violation of the accused's Sixth Amendment right to a public trial, it nevertheless recognized that departures from an otherwise "public trial" could be made in appropriate circumstances, saying that such departures should be tested by "a standard of strict and inescapable necessity." It indicated, as an example, that in a prosecution for violation of the Mann Act, it would regard as permissible the exclusion of youthful spectators "to protect public morals," assumedly because of testimony about indecent or immoral matters.

Exclusion of spectators from the courtroom in rape cases to protect the reputation of the victim-witness for the prosecution has been recognized by the 8th Circuit as "an accepted practice," not violative of the accused's Sixth Amendment right to public trial. *Harris v. Stephens*, 361 F.2d 888, cert. den. 386 U.S. 964.

Exclusion of the public during the testimony of a police undercover agent in order to maintain the secrecy of his identity for his own safety and continued usefulness in law enforcement has been upheld as not violating the accused's right to public trial by the New York Court of Appeals in *People v. Hinton*, 31 N.Y.2d 71 (1972), cert. den. 410 U.S. 911 (1973). The New York Court of Appeals there said:

"The guarantee of a public trial, firmly embedded in our jurisprudence . . . does not mean that the public

is entitled to be present at the trial under all circumstances . . . and this right is subsumed 'in certain situations in the interest of sound judicial administration,' " 31 N.Y.2d at 73-74,

and described itself as

"reaffirm[ing] today the inherent discretionary power of the trial court to close the courtroom . . . when unusual circumstances necessitate it," 31 N.Y.2d at 75.

In this Court, in *United States v. Bell*, 464 F.2d 667 (1972), cert. den. 409 U.S. 991 (1972), the 2nd Circuit ruled that the exclusion not only of the public but also of the defendant himself at a portion of a suppression hearing, which had been stipulated would be the entire trial of the accused, at which testimony of the secret airlines "skijack profile," under which the accused had been selected for search, did not violate his right to public trial under the Sixth Amendment because of the justification therefor furnished by the need to preserve the secrecy of the "skijack profile" from public disclosure to protect the air traveling public. The Court, in an opinion by Mulligan, C.J., said:

"Barring the public including the press from the suppression hearing in this case presents no great constitutional difficulty. While secret proceedings are of course odious and smack of ideologies as repugnant to the Founders as they are today, there is precedent for the proposition that limited exceptions are constitutionally permissible. Thus, the exclusion of the public in whole or in part has been found constitutionally acceptable where it was deemed necessary to protect the defendant, *Sheppard v. Maxwell*, 384 U.S. 333 . . . *Estes v. Texas*, 381 U.S. 532 . . ., where there has been harassment of witnesses, *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), cert. denied,

397 U.S. 957 . . . or to preserve order, *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008 The justification for the limited exclusion here in our view, protection of the air travelling public, presents at least as substantial a consideration as those which prompted the previously recognized exceptions," 464 F.2d at 670.

Thus, this Court has recognized expressly that protection of the interest in secrecy of persons *other than* parties and witnesses can provide a legitimate justification for limitation on the right to "public trial."

Nor has this Court indicated that this legitimate recognition of the interests of persons other than witnesses and parties is to be limited to the "sikjack profile" situation. In *United States v. Clark*, 475 F.2d 240 (2nd Cir. 1973), this Court dealt with another situation in which the accused had been convicted of a narcotics law violation following a search made after he had been selected for search because he fit the "skijack profile." In that case, the public had been excluded from the entire suppression hearing, not simply that portion of it at which the "skijack profile" was disclosed or discussed. This Court therefore reversed the conviction, but plainly indicated that its view in the *Bell* case of permissible limitations on the right of public trial were not restricted to the "skijack profile" situation. This Court, by Mansfield, C.J., said:

"Barring the public from the entire hearing was likewise an error of constitutional magnitude. *Without the justification* of 'protection of the air travelling public,' *or other compelling reasons* * * * there was no reason to deprive the accused of his rights to a public trial," 475 N.Y. at 246 (emphasis added).

In sum, the decided cases (reflected now in the Proposed Rule of Evidence approved by the Supreme Court) had already recognized that in criminal trials, the interests of justice, not only to the rights of the accused, but to the interests of non-parties as well, may result in the exclusion of the public, strictly limited to that necessary for the protection of such interest, without violating the accused's right to a public trial.

The Proposed Rule of Evidence for the protection of trade secrets parallels that Court's recent judicial recognition of the importance of trade secret protection. In upholding a state statute designed for the protection of trade secrets, against attack that the statute was invalid because pre-empted by the federal patent laws, the Court stated:

"The holder of a trade secret would not likely share his secret with a manufacturer who cannot be placed under binding legal obligation to . . . protect the secret. The result would be to hoard rather than disseminate knowledge." *Kewanee Oil Co. v. Bicron Corp.*, No. 73-187, decided May 13, 1974, — U.S. —.

The Proposed Rule of Evidence is also reflective of the strong Congressional recognition that trade secret protection is the kind of "compelling" reason that the Court has said in the *Clark* case would justify exclusion of the public from part of a criminal trial.

The vast array of federal statutes adopted by Congress for the protection of trade secrets includes: Freedom of Information Act, 5 U.S.C. Sec. 552(b)(4), prohibiting federal agency disclosure of trade secrets, 18 U.S.C. Sec. 1905,

making it a federal crime for a United States officer or employee to disclose trade secrets except as authorized by law; the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78x(a), prohibiting the SEC from requiring that trade secrets or processes be revealed; the Federal Trade Commission Act, 15 U.S.C. Sec. 46(f), preventing the FTC from making trade secrets public; 15 U.S.C. Sec. 1263(h), prohibiting persons from disclosing trade secrets acquired in connection with HEW inspection and investigation of hazardous substances; 15 U.S.C. Sec. 1401(c), requiring trade secrets received in Department of Transportation inspections and investigations of federal vehicle safety standards to be considered confidential; 21 U.S.C. Sec. 331(1), prohibiting any person from wrongfully using or disclosing trade secret information concerning methods of processes required under the Federal Food, Drug & Cosmetic Act; 33 U.S.C. Sec. 1160(f)(2), excluding trade secrets from having to be disclosed at public hearings under the Federal Water Pollution Control Act; 42 U.S.C. Sec. 1857d(c)(5), providing that no witness shall be required to disclose trade secrets in hearings under the Clean Air Act.

It is true that the Proposed Federal Rules of Evidence have not yet become law. Nevertheless, their approval plainly indicates that the Supreme Court believes that the federal courts have power to, and should, protect trade secrets from disclosure in criminal trials.

In these circumstances, it is respectfully submitted that the District Court's belief it had no power to grant the relief sought by Stamicarbon upon its motion was clearly erroneous. Cyanamid's Sixth Amendment right to a "pub-

lie trial" is limited by the need for secrecy to protect Stamicarbon's trade secrets from public disclosure. The District Court had the power to provide such protection.

POINT IV

The court below had already entered an order upon Cyanamid's consent in the criminal contempt proceeding, in effect, providing for the *in camera* protection of Stamicarbon's trade secrets to the extent that information was disclosed in certain documents employed or received by the Government's expert; Cyanamid's consent to such *in camera* protection *without knowing* the extent to which such trade secrets were so disclosed constitutes a waiver of its right to public trial with respect to any such information.

As indicated in the statement of facts herein, pp. 13-15, the District Court denied Stamicarbon's motion solely upon the ground that it could not grant the relief sought without Cyanamid's waiver of its right to "public trial" of the criminal contempt with which it is charged in 60 Civ. 3857 (43a).

At the time that this action was brought and the motion presented, plaintiff's counsel were unaware of the stipulation made in the District Court on May 7, 1974 (31s) and of the consent order made thereon on May 8, 1974 in 60 Civ. 3857. That order (32-33s), to which Cyanamid consented, decrees that "documents employed or received by J. Lisle Reed in conducting the study" which preceded his report of U.S. Plant Capacity for the Production of Melamine, of March 7, 1973, were to be produced by the Government to Cyanamid. That order designated such

documents "as containing sensitive commercial or proprietary information" (32a), and provides that:

"If said . . . documents or information contained therein are used in conjunction with the trial of this case, they shall be utilized in a manner which will maintain the confidentiality of the sensitive commercial or proprietary information contained therein, subject to further order by the Court," (32-33a, emphasis added).

The record clearly shows that the "sensitive commercial or proprietary information" contained in such documents is, if not entirely, at least largely, Stamicarbon trade secret information which was received by Mr. Reed from Stamicarbon licensees who are competitors of Cyanamid "under a pledge of confidentiality" (33a, 42a).

Clearly the May 8, 1974 order in 60 Civ. 3857 provides, in effect, for *in camera* receipt of any such information as is elicited at the trial of the criminal contempt proceeding therein. There is no other way that such information could be utilized as evidence at trial by which the confidentiality thereof can be maintained.

It would be purely accidental if the documents furnished by Stamicarbon licensees to Mr. Reed, to the information in which this order relates, embraced all aspects of Stamicarbon's trade secrets, and, whether or not they in fact do so is not known to plaintiff's counsel. But, by like token, Cyanamid's consent to the order was necessarily given in advance of any knowledge by it of the extent to which Stamicarbon trade secret information was contained in such documents. In short, Cyanamid gave a blanket consent that any "sensitive commercial or proprietary in-

formation" which *might be* contained therein would be utilized at the trial only in such a manner as would maintain its confidentiality. Plainly, in this circumstance, Cyanamid's consent to that order (315) should be regarded as a knowing waiver of any right it might had to presentation of any Stamicarbon trade secret information at its trial in the criminal contempt proceeding, whether or not that information, as it may have turned out, was or wasn't encompassed in the documents furnished to Mr. Reed.

Conclusion

This Court should reverse the order of the District Court and direct the District Court to receive *in camera* any evidence relating to Stamicarbon's trade secrets offered or elicited at the trial in the criminal contempt proceedings in 60 Civ. 3857.

Dated: New York, New York
August 14, 1974

Respectfully submitted,

IDE & HAIGNEY
Attorneys for Plaintiff-Appellant

JOHN E. HAIGNEY
RONALD M. GLICK
Of Counsel

Service of 2 copies of the
within Brief is hereby
admitted this 14th day of
August 1974

Signed _____

Attorney for Defendant - Appellee

 COPY RECEIVED

AUG 14 1974

DONOVAN LEISURE
NEWTON & IRVINE

Brief